Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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Docket No. 80-1341

IN THE

UNITED STATES SUPREME COURT

In the Matter of

Charles Sutton, an attorney,

Petitioner.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated : March, 1981

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Note: * Pet. 8a; **Pet. 5a-6a.
PLEASE NOTE CORRECTION OF PETITION:
Pet. 8a: Seventh Amend. should be SIXTH AMEND.

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SUPPLEMENTARY QUESTIONS PRESENTED

1. Whether F.R.A.P. 46(b) and Second Circuit Rule 46(f)(4), 28 U.S.C.A., as applied in this original proceeding are erroneous and unconstitutional and void under the Fifth and Fourteenth Amendments to deny petitioner a hearing ?

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STATEMENT

Subsequent to the filing of the Petition dated January, 1981 in this case, the Second Circuit Court of Appeals rendered its order dated February 17, 1981 granting reconsideration of petitioner's motion to vacate its order of suspension. (Supp. to Pet.*, 1a-4a). Petitioner duly moved the Second Circuit Court of Appeals by Notice of Motion dated January 13,1981

*Note : This Supplement to Petition, hereinafter referred to as "S.P."

for an order granting petitioner reconsideration and rehearing of his motion to revoke or modify the order of suspension dated January 11,1980 (which was stayed until November 12, 1980) granting a suggestion for a rehearing and reconsideration en banc, granting petitioner's request for a written opinion, recalling the order of November 12, 1980, and for an early hearing and decision (Pet. 11-12; 1-2). The Second Circuit Court of Appeals shows by its said order dated February 17, 1981 (S.P. 1a - 4a) that it directly considered and ruled upon the issues raised by the Petitioner and presented in his Petition, including the constitutional impermissibility of the use of the preponderance of evidence standard of proof. The order and decision of the lower court raises the important issues of due process and equal protection under the Fifth and Fourteenth Amendments in this original attorney disciplinary proceeding

by reason of the denial of an opportunity to be heard at a hearing, as expressly provided by F.R.A.P. 46(b), which Petitioner timely and duly requested. (Pet. 5a-6a; 9-12), the constitionality of F.R.A.P. 46(b), as applied in that it is void and unconstitutioanl under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments, and important questions of federal procedure in an original attorney disciplinary proceeding.

Point I

F.R.A.P. 46(b) is unconstitutional and void as applied to deny a hearing

F.R.A.P. 46(b) expressly provides that petitioner has a right to a hearing "if requested" (Pet. 5a-6a), which request was timely and duly made (Pet.3a;5-6). The lower court has construed the rule to permit a hearing only if the said court finds that 'there is an indication that the state proceedings were defective for any of

the compelling reasons identified by the Supreme Court in Selling v. Radford.' (S.P. 3a-4a). It is respectfully submitted that this construction conflicts with the clear language of F.R.A.P. 46(b) and with Petitioner's constitutional rights under the Fifth and Fourteenth Amendments, and raises serious and important questions of federal procedure under F.R.A.P. 46(b) in original attorney disciplinary proceedings, which can only be resolved by this Court.

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED FEBRUARY 17, 1981

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit , held at the United States Courthouse in the City of New York on the seventeenth day of February, One Thousand Nine Hundred and Eighty-One.

PRESENT : HONORABLE J. EDWARD LUMBARD

HONORABLE WALTER R. MANSFIELD

HONORABLE ELLSWORTH A. VAN GRAAFEILLAND,

Circuit Judges.

In the Matter of Charles Sutton,

An Attorney.

Docket No. 80-8008

Charles Sutton has moved for rehearing and reconsideration of our earlier order dated November 12, 1980, denying his motion to vacate our earlier

order dated January 11, 1980, suspending him from practice before this court pursuant to F.R.A.P. 46(b) and Second Circuit Rule 46(f)(1), or, in the alternative, for a de novo hearing on the merits.

The motion for reconsideration is granted and upon reconsideration, we adhere to our earlier order denying the motion to vacate. We find no denial of due process in the proceedings of the Appellate Division, Second Judicial Department of New York State Supreme Court, which resulted in Sutton's suspension or in our Rule 46(f)(1) which follows and applies in our Court the decision of that court. Sutton was suspended by the Appellate Division after a hearing before a referee, with opportunity to appear, call witnesses and cross-examine witnesses called by the Grievance Committee. The preponderance

of the evidence" standard used by the state, see Feola v. New York State Bar Assn., 37 A.D.2d 789, 324 N.Y.S.2d 654(3d Dept. 1971); In re Mogel, 18 A.D.2d 203, 238 N.Y. S.2d 683 (1st Dept. 1963), does not violate due process principles for this type of adjudication, which rests within the state's discretion, Addington v. Texas, 441 U.S. 418,423(1979). The New York rules relating to attorneys' professional ethics (DR 9-102) are neither arbitrary nor irrational and do not deny due process. The findings of the referee and the Appellate Division are not contrary to the strong weight of the evidence, see Selling v. Radford, 243 U.S. 46 (1917).

Since there is no indication that the state proceedings were defective for any of the compelling reasons identified by the Supreme Court in Selling v. Radford, supra., no hearing under F.R.A.P.

46(b) is required.

/s/ J.Edward Lumbard

J.Edward Lumbard, U.S.C.J.

/s/ Walter R. Mansfield

Walter R. Mansfield, U.S.C.J.

/s/ Ellsworth A. Van Graafeiland

Ellsworth A. Van Graafeiland,
U.S.C.J.